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Nos. 96-1186, 96-1187 and 96-1188

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ASSOCIATED GAS DISTRIBUTORS, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS PROCESS GAS CONSUMERS GROUP, AMERICAN IRON AND STEEL INSTITUTE AND GEORGIA INDUSTRIAL GROUP

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit correctly held that the Federal Energy Regulatory Commission ("FERC") did not exceed its jurisdiction under Natural Gas Act Section 1(b), 15 U.S.C.§ 717(b), Pet. App. at 1007a-1008a, to regulate the transportation of natural gas in interstate commerce by requiring the reallocation of interstate pipeline capacity between a local distribution company and its customers, or by a municipality, to comply with FERC's capacity release regulations.

RULE 29.6 LISTING

The Process Gas Consumers Group ("PGC") is an association of industrial consumers of natural gas organized to promote the development and adoption of coordinated, rational and consistent federal and state policies affecting industrial gas users. PGC members own and operate hundreds of manufacturing plants located throughout the United States. PGC has no parent or subsidiary companies.

The American Iron and Steel Institute ("AISI") is the principal trade association of the domestic steel industry. Its 35 domestic members account for approximately two-thirds of the raw steel production capability in the United States. AISI has no parent or subsidiary companies.

The Georgia Industrial Group ("GIG") is an association of industrial users of natural gas located in the states of Georgia and Alabama. GIG actively participates in variety of state and federal proceedings affecting the price of natural gas and electricity in the states of Georgia and Alabama. GIG has no parent or subsidiary companies.

Members of PGC, AISI and GIG consume substantial quantities of natural gas delivered through interstate natural gas pipelines.

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The Process Gas Consumers Group, American Iron & Steel Institute, and the Georgia Industrial Group, Respondents in the captioned cases, respectfully request that this Court deny the petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (reported at 88 F.3d 1105 (1996)(Pet. App. at 1a to 174a)), submitted by local distribution companies ("LDCs") in No. 96-1186, state regulatory agencies ("PSCs") in No. 96-1188, and municipalities that own local distribution facilities ("municipalities") in 96-1187.

STATEMENT OF THE CASE

The Natural Gas Act ("NGA"), 15 U.S.C. § 717 et seq., provides the basic framework for regulation of the natural gas industry. Since 1978, the regulation of interstate transportation and sales for resale by interstate pipelines has undergone dramatic change. [1]

Regulatory initiatives undertaken by the Federal Energy Regulatory Commission ("FERC") have "unbundled" the sales and transportation services formerly provided in "package" form by interstate pipelines. At the heart of that unbundling is the requirement of "open access" interstate transportation, which is based on the NGA's prohibition against "unduly discriminatory or preferential" rates or terms of pipeline services. 15 U.S.C. §§ 717c(b) and 717d(a). These initiatives

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[1] The court of appeals decision aptly described this regulatory evolution as having "gradually withdrawn from direct regulation of certain industry sectors in favor of a policy of 'light-handed regulation' when market forces make that possible." Pet. App. at 6a. Prior to 1978, producers typically sold gas to federally-regulated, interstate natural gas pipelines who, in turn, provided a combined, or "bundled," transportation/gas sales service to LDCs. The LDCs then provided a state-regulated, bundled retail sales/transportation service to end-users of natural gas.

enable all interested shippers -- including LDCs, end-users, producers and gas marketers -- to contract for interstate transportation of gas among virtually any combination of receipt and delivery points on an interstate pipeline. As a result, LDCs, producers, marketers and end-users are able to sell, buy and ship natural gas virtually anywhere on the interstate transportation grid. A dynamic, integrated national market for natural gas has emerged, complete with a vibrant futures market, actively traded regional markets, and a "secondary market" for interstate transportation rights. At the retail level, many States have implemented similar unbundling programs for LDC sales and transportation services.[2/]

1. The Natural Gas Policy Act of 1978.

Congress took the first step away from the bundled service approach in 1978 by enacting the Natural Gas Policy Act ("NGPA"). 15 U.S.C. § 3301 *et seq.*. The NGPA phased out regulation of wellhead prices charged by natural gas producers. As this Court recently observed, the NGPA also was designed to "promote gas transportation by interstate and intrastate pipelines." *General Motors Corp. v. Tracy*, 1997 U.S. Lexis 692, at *12 (decided February 18, 1997), *quoting* 57 Fed. Reg. 13271 (1992). Thus, with the NGPA, Congress began the process of introducing greater competition into natural gas markets by separating interstate pipelines' sales and transportation functions into discrete services.

2. FERC Order No. 436.

In 1985, FERC sought to further the NGPA's goal of a more competitive national wellhead market by promulgating

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2/ *See generally* U.S. Dept. of Energy, Energy Information Administration, "State Regulators Promote Consumer Choice in Retail Gas Markets," *Natural Gas 1996: Issues and Trends*, at 113-124 (Dec. 1996).

Order No. 436.[3/] In Order No. 436, FERC recognized that encouraging competitive gas markets required nondiscriminatory access to interstate pipeline transportation.[4/] Order No. 436 promoted nondiscriminatory access to the national transportation grid by, among other measures, providing "blanket certificates" (as opposed to the contract-specific, NGA Section 7(c) certificate otherwise required) for pipelines willing to provide transportation service pursuant to open access principles. At their core, these principles required interstate transporters to provide access to all shippers on a nondiscriminatory, "first-come, first-served" basis, even if the shipper intended to compete with the transporter in the sale of gas.[5/] In this way, Order No. 436 sought to afford downstream gas purchasers an alternative to buying gas under pipelines' bundled sales/transportation service.

In the wake of Order No. 436, pipelines sought FERC authorization for a variety of "capacity release,"[6/] "capacity

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3/ *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,665 (1985)("Order No. 436").

4/ *Id.* at 31,494-504.

5/ *Id.* at 31,516-518. *See Colorado Interstate Gas Co. v. FERC*, 890 F.2d 1121,1123 (D.C. Cir. 1989).

6/ *See, e.g., Arkla Energy Resources*, 53 FERC ¶ 61,127 (1990); *East Tennessee Natural Gas Company*, 53 FERC ¶ 61,304 (1990); *Florida Gas Transmission Co.*, 51 FERC ¶ 61,309, *order on reh'g*, 53 FERC ¶ 61,396 (1990).

brokering"[7] and "transportation assignment" programs.[8] Under such programs, shippers holding interstate pipeline capacity could reallocate their right to use some or all of their pipeline capacity to third-parties. In authorizing capacity brokering and assignment programs, FERC specifically reserved the right to modify or terminate the programs as required by the public convenience and necessity. *See Algonquin Gas Transmission Co.*, 59 FERC ¶ 61,032 at 61,092-93 (1992).[9]

When Congress completed the deregulation of wellhead prices with passage of the Natural Gas Wellhead Decontrol Act

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7/ *See, e.g., Algonquin Gas Transmission Co.*, 53 FERC ¶ 61,417 (1990); *Columbia Gas Transmission Corp.*, 49 FERC ¶ 61,071 (1989); *Kern River Gas Transmission Co.*, 50 FERC ¶ 61,069 (1990).

8/ *See, e.g., CNG Transmission Corp.*, 55 FERC ¶ 61,189 (1991); *Columbia Gas Transmission Corp.*, 49 FERC ¶ 61,071 (1989); *Texas Eastern Transmission Corp.*, 48 FERC ¶ 61,248, *order on reh'g*, 48 FERC ¶ 61,378 (1989), *order on reh'g*, 51 FERC ¶ 61,170, *order on reh'g*, 52 FERC ¶ 61,273 (1990).

9/ Contrary to the PSCs' characterization, FERC did not recognize in *Texas Eastern Transmission Corp.*, 48 FERC ¶ 61,378 at 62,552 (1989)("*Texas Eastern*") that "capacity purchased by LDCs in interstate pipeline facilities should be treated as the LDCs' (not the pipelines') own capacity." PSC Petition at 7. Consistent with "capacity assignment" programs generally, *Texas Eastern* considered reallocation of pipeline capacity held by a second interstate pipeline, Algonquin Gas Transmission Company, not an LDC. Thus, FERC had before it a capacity reallocation issue concerning two entities over which it clearly had jurisdiction; it did not consider whether upstream capacity held by a nonjurisdictional LDC could be considered an "expansion" of that LDC's system. Accordingly, the impression created by the LDCs' replacing the name "Algonquin" with the bracketed words "an LDC's" and "the LDC's" when quoting *Texas Eastern* -- that FERC acknowledged state jurisdiction over interstate capacity held by LDCs -- distorts the meaning of that decision.

of 1989,[10] it urged retention of Order No. 436's "open access" transportation regime. The Congress emphasized that:

> [T]hese new rules, and especially the wide adoption of blanket certificates for nondiscriminatory open access interstate transportation of non-pipeline gas, are essential to its decision to complete the decontrol process.

H.R. Rep. No. 29, 101st Cong., 1st Sess., at 6 (1989). Indeed, Congress encouraged FERC "to retain and improve this competitive structure in order to maximize the benefits of decontrol." *Id.*

3. FERC Order No. 636.

Notwithstanding the partial success of Order No. 436, FERC eventually concluded that shippers purchasing their gas supplies from nonpipeline sources were not receiving the same quality of transportation service as those taking the pipelines' bundled service.[11] This disparity in service quality led FERC to promulgate Order No. 636, which required pipelines

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[10] Pub. L. No. 101-60, 103 Stat. 157 (1989).

[11] *See Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; and Regulations of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,939 at 30,398-407 (Pet. App. at 175a-407a, at 195a-215a), *order on reh'g*, Order No. 636-A, FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,950 (Pet. App. 408a-812a), *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992)(Pet. App. 813a-998a), *reh'g denied*, Order No. 636-C, 62 FERC ¶ 61,007 (1993)(Pet App. 999a-1000a).

> to provide all transportation services on a basis that is equal in quality for all gas supplies whether purchased from the pipeline or from any other gas supplier.

Order No. 636, Pet. App. at 182a-183a. With Order No. 636, FERC completed its efforts to establish interstate pipeline transportation capacity and natural gas as separate "commodities" obtainable from different sources. Order No. 636 shifted FERC's regulatory focus away from judging the "comparability" of a pipeline's bundled and unbundled transportation services toward

> ensuring that pipeline transportation of all gas supplies is performed on an equal basis under reasonable transportation terms and conditions that enable buyers to use open access transportation to maximize the benefits of a competitive wellhead natural gas market.

Id. at 234a.

As part of Order No. 636's pro-competitive regulatory initiatives, FERC established a framework to govern pipeline customers' reallocation of interstate pipeline transportation capacity to third parties. Previously, FERC had approved differing capacity release, brokering, and reassignment programs for individual pipelines. In Order No. 636, FERC concluded that a structured, industry-wide program permitting "capacity release" would better serve interstate markets than either a prohibition or a collection of individualized programs:

> First, . . . the Commission no longer believes that it can adequately monitor capacity brokering under existing certificates to ensure that all allocations are nondiscriminatory.

> Simply put, there are too many potential assignors of capacity and too many different programs for the Commission to oversee capacity brokering as it now exists. Second, the Commission believes that the two new generic allocation of capacity programs it is adopting make the necessary adjustments to eliminate the potential for firm capacity holders to unduly discriminate in their assignment of capacity, and facilitate the development of the secondary transportation market.

Id. at 238a-239a. Order No. 636's "capacity release" provisions permitted holders of unused interstate pipeline capacity to resell that capacity, either temporarily or permanently, to third-parties through a bidding system maintained by the pipeline. FERC explained that its capacity release mechanism "would afford buyers and sellers of firm capacity with one place to shop to ensure that firm capacity is used as efficiently as possible." *Id.* at 245a.

FERC's capacity release regulations, as supplemented by individual pipelines' tariffs, establish procedures for releasing transportation capacity rights and pipelines' execution of contracts with replacement shippers. Releases may be accomplished through bidding on a pipeline-sponsored electronic bulletin board or through "prearranged releases" negotiated between the releasor and replacement customer or through a combination of those procedures. Ultimately, however, while the terms of the release must be acceptable to the releasor, the terms of the release must also be consistent with the pipelines' filed tariffs and the replacement shipper must enter into a contract with the pipeline to receive the

released transportation service.[12/] Unless the release of capacity is permanent, the releasing shipper would remain liable on its contract with the pipeline, but would receive a credit against its bill for the capacity resold. *Id.* at 245a-252a.

4. The Court of Appeals Decision.

Local distribution companies, PSCs, and municipalities that own local distribution facilities sought judicial review of Order No. 636's capacity release regime. The LDCs challenged certain aspects of FERC's jurisdiction over capacity release transactions (Pet. App. at 79a-80a) and, together with the PSCs, argued that such transactions between LDCs and their customers came within the states' jurisdiction over "local distribution." *Id.* at 81a. The municipalities similarly maintained that their capacity release transactions were outside FERC's jurisdiction because municipalities do not come within the definition of a "natural gas company" subject to the NGA. *Id.* at 83a.

In its decision, the United States Court of Appeals for the District of Columbia Circuit rejected all challenges to FERC's capacity release program. The court of appeals found the release of interstate pipeline capacity to constitute an aspect of the interstate transportation of natural gas. The regulations governing such releases "operate as a term or condition of pipeline service, with which its customers must comply." *Id.* at 80a. Moreover, because this Court's decisions under the Commerce Clause precluded state regulation of interstate transportation, the court of appeals found that

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12/ Pipelines' tariffs permit negotiation of some terms, such as contract duration and, within limits, price. That is, the tariff permits a pipeline to charge rates between a filed maximum and a filed minimum, and neither the pipeline nor the releasor may charge rates outside the FERC-approved range.

> the federal government interceded to ensure stability and protect the interests of the consuming public. It thereby occupied the field, which necessarily includes both the sale and resale of interstate transportation rights.

Id. at 81a. Consequently, the court of appeals concluded that regulation of capacity release transactions fell within the exclusive and plenary jurisdiction over interstate transportation granted FERC under the NGA.

Having concluded that capacity release transactions came within FERC's general jurisdiction over interstate transportation, the court of appeals next declined to adopt the limitations on that jurisdiction proposed by the LDCs, PSCs, and municipalities. The court of appeals found that the jurisdiction over "local distribution" granted states by NGA Section 1(b) "does not withdraw from FERC's jurisdiction any aspect of the interstate transportation of natural gas," *Id.* at 82a, and concluded that "states have never regulated the terms and conditions of interstate pipeline transportation." *Id.*

With regard to the municipalities' definitional argument, the court of appeals reasoned that "FERC's transportation jurisdiction extends as a separate matter over capacity release given the involvement of interstate gas pipelines," *Id.* at 84a, and further observed that "the transaction itself controls access to interstate transportation capacity, entirely independent of the jurisdictional nature of the releasing and replacement shippers." *Id.* at 85a. The court of appeals found "most persuasive" the analogy between FERC's curtailment regulations and the capacity release program, in that "both involve the pipelines' allocation of transportation capacity among their shippers in compliance with federally mandated strictures." *Id.*

REASONS WHY THE PETITIONS SHOULD BE DENIED

I. Petitioners Have Not Demonstrated a Compelling Reason Justifying This Court's Review of the Court of Appeals Decision.

Rule 10 of this Court's Rules instructs that review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." While not an exhaustive listing, Rule 10 identifies reasons that could prove sufficiently compelling to justify the granting of a writ of certiorari. Examples theoretically applicable to the court of appeals decision at issue include conflicting decisions between United States courts of appeals on an important matter, important federal law questions of first impression requiring resolution by this Court, or a court of appeals decision regarding an important federal question that conflicts with relevant decisions of this Court.

Here, the petitions in Nos. 96-1186, 96-1187, and 96-1188 fail to identify a credible, let alone compelling, reason to justify granting a writ of certiorari. The petitions point to the decision of no other circuits with which the court of appeals decision at issue conflicts. The petitions do not purport to identify an important federal question of first impression requiring resolution by this Court. Nor do the petitions demonstrate a conflict between the court of appeals decision and any decision of this Court concerning an important federal question.

The petitions do not challenge the court of appeals' determination that promulgation of the capacity release program represents a permissible exercise of FERC's jurisdiction over the interstate transportation of natural gas. Instead, the petitions argue more narrowly that FERC exceeded

its jurisdiction in applying its capacity release regulations to releases between LDCs and their customers, and by municipalities. According to one petition:

> As should be clear, this petition presents no challenge to the concept of "unbundling" or the overall objectives of the federal plan. Rather, it concerns only the question of ultimate control over one aspect of the current market structure, the resale of capacity by LDCs to in-state customers.

LDC Petition at 24. The petitions disagree at length with the analytical approach adopted by the court of appeals in resolving their jurisdict ional claims, maintaining that inadequate attention was paid to State regulatory prerogatives preserved by the NGA. LDC Petition at 18-20; PSC Petition at 11-13; Municipalities Petition at 9-12.

The petitions fail to identify an "important federal question" warranting this Court's attention. The narrow jurisdictional arguments posited by the PSCs, LDCs and municipalities rest on the fundamental mischaracterization of capacity release transactions between LDCs and their customers, and by municipalities, as "local distribution services" traditionally provided subject to state or local regulation. In fact, the release of interstate pipeline capacity plainly involves interstate transportation by interstate pipelines, not local distribution service -- as the court of appeals correctly found and the petitions do not contest. The released interstate transportation rights extend across many states -- from Texas and Louisiana to New York and Massachusetts and everywhere in between -- and require a contract between the transporting pipeline and the replacement shipper that acquires the service. Indeed, the ability of LDCs and municipalities to release interstate pipeline capacity directly results from FERC's

regulation of interstate pipeline services, including the unbundling of services offered by interstate pipelines. Consequently, as explained in Section II, *infra*, the release of interstate pipeline capacity by LDCs and municipalities, whether to their customers or any other third party, falls within FERC's exclusive jurisdiction over the interstate transportation of natural gas.

Furthermore, while the petitions occasionally reference this Court's precedents regarding the boundaries of federal and state jurisdiction under the NGA, at no time do they identify a single holding of this Court with which the court of appeals decision purportedly conflicts. Indeed, the municipalities' petition attacks the court of appeals for its supposed failure to adhere to *FERC* precedents, not the prior holdings of this Court. *See* Municipalities Petition at 12-19.

At best, the petitions evidence continuing disagreement with the jurisdictional conclusions reached by the court of appeals; however, mere disagreement with the court of appeals, no matter how deeply felt or forcefully expressed, does not justify review by this Court. Thus, the petitions manifestly fail to present a compelling reason for this Court to review the decision of the court of appeals. Accordingly, the petitions for writ of certiorari in Nos. 96-1186, 96-1187, and 96-1188 should be denied.

II. The Court of Appeals Decision Is Consistent with Both the NGA and This Court's Precedents Regarding the Scope of Federal Jurisdiction Over the Transportation of Natural Gas in Interstate Commerce.

The court of appeals decision is entirely consistent with both the NGA and this Court's prior precedents concerning the jurisdictional boundaries between federal and state regulatory

responsibilities. The NGA subjects the natural gas industry "to interlocking regulation by both federal and state authorities." *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493, 506 (1989)("*Northwest*"). The framework for this "interlocking regulation" is set forth in NGA Sections 1(b) and 1(c). *See* 15 U.S.C. §§ 717(b),(c). NGA Section 1(b) provides, in pertinent part, that the statute's provisions "shall apply to the transportation of natural gas in interstate commerce . . . and to natural-gas companies engaged in such transportation." 15 U.S.C. § 717(b). The NGA

> contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution.

FPC v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 502-503 (1949).

This Court repeatedly has interpreted Section 1(b)'s grant of federal jurisdiction over interstate transportation as affording "exclusive Federal Energy Regulatory Commission jurisdiction over 'the transportation of natural gas in interstate commerce . . . .'" *Northwest*, 489 U.S. at 510. The Court has declared it "well settled" that "Congress occupied the field of matters relating to . . . transportation of natural gas in interstate commerce." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305, (1988)("*Schneidewind*"). *See also FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972)("*Louisiana Power & Light*), *quoting Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947)(Congress drew three things "within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission" including "the transportation of natural gas in

interstate commerce"); *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 503 (1949)(same). In so doing, Congress intended that FERC "regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act." *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 91-92 (1963)("*Northern Natural Gas*"). *See also Schneidewind*, 485 U.S. at 310 ("uniformity of regulation . . . was an objective of the Natural Gas Act").

This Court has soundly rejected previous attempts to read into NGA Section 1(b) limitations on FERC's plenary jurisdiction over the interstate transportation of natural gas. In *Louisiana Power & Light*, the Court dismissed the contention that federal jurisdiction over transportation applied only to interstate pipeline "sales for resale" and did not reach "direct sales" by interstate pipelines to end-users. The Court explained that each of the areas reserved to federal jurisdiction by Section 1(b)

> is an independent grant of jurisdiction and, though the Act's application to "sales" is limited to sales of interstate gas for resale, the Act applies to interstate "transportation" regardless of whether the gas transported is ultimately sold retail or wholesale.

406 U.S. at 636. Similarly, in *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950)("*East Ohio Gas*"), the Court refused to read the federal jurisdiction over interstate transportation as limited to companies that either transported "gas in interstate commerce for hire or for sales to be followed by resales." *Id.* at 468. According to the Court, "the short answer is that the Act's language did not express any such limitation." *Id.* The Court went on to observe that:

> [T]hroughout the Act "transportation" and "sale" are viewed as separate subjects of regulation. They have independent and equally important places in the Act. Thus, to adopt respondents' construction would unduly restrict the Commission's power to carry out one of the major policies of the Act.

Id. [13/]

Contrary to the LDCs' contention that "the perceived federal need for uniformity must give way to the primacy of state regulation as guaranteed by the Act," LDC Petition at 19, this Court has made clear that state regulation may not impinge upon FERC's ability to achieve the comprehensive regulatory scheme mandated by the NGA. Even where a state purports to regulate within a sphere reserved to its jurisdiction by the NGA, "[s]tate regulation . . . may be pre-empted as conflicting with FERC's authority over interstate transportation . . . if state regulation prevents attainment of FERC's goals." *Northwest*, 489 U.S. at 515-16; *Schneidewind*, 485 U.S. at 299-300. For example, in *Northern Natural Gas*, the Court invalidated certain regulatory orders promulgated by the State of Kansas ostensibly pursuant to its NGA Section 1(b) jurisdiction over "production or gathering." Because the orders at issue required an interstate pipeline to purchase gas in a certain manner, the Court concluded that:

13/ NGA Section 1(c), passed by Congress in response to *East Ohio Gas*, does not alter the scope of FERC's jurisdiction over the interstate transportation of natural gas. This Court recently characterized Section 1(c) as simply a Congressional acknowledgement regarding "the important role of the States in regulating *intrastate* transportation and distribution of natural gas." *General Motors Corp. v. Tracy*, 1997 U.S. Lexis 692, *28 (decided February 18, 1997)(emphasis added).

> These State orders necessarily deal with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity which was an objective of the Natural Gas Act. They therefore invalidly invade the federal agency's exclusive domain.

372 U.S. at 91-92. In such situations, the Court emphasized that "[n]ot the federal but the state regulation must be subordinated, when Congress has so plainly occupied the regulatory field." *Id.* at 93. *See also Schneidewind*, 485 U.S. at 310, *quoting Northern Natural Gas*, 372 U.S. at 91-92 ("prospect of interference with the federal regulatory power" permits pre-emption of state law even though "collision between the state and federal regulation may not be an inevitable consequence").

The language of NGA Section 1(b), and this Court's prior decisions interpreting it, make plain that FERC possesses exclusive jurisdiction to regulate a particular *activity, i.e.* transportation of natural gas in interstate commerce. While Section 1(b) also affords FERC jurisdiction over particular entities engaged in such transportation (*i.e.* "natural-gas companies"), this represents a separate jurisdictional grant that does not modify or constrain FERC's Section 1(b) jurisdiction over interstate transportation of natural gas. In other words, FERC's jurisdiction over the interstate transportation of natural gas *is wholly unrelated to the nature of the entities involved in that activity.* For this reason alone, contentions that capacity release transactions between LDCs and their customers, or by municipalities, lie wholly outside FERC's jurisdiction over interstate transportation, are without merit.

Moreover, the NGA's goal of uniform regulation for the interstate transportation of natural gas, together with the states' acknowledged lack of jurisdiction over that activity at the time Congress passed the NGA, further support the conclusion, reflected in the decisions of this Court, that FERC possesses plenary jurisdiction over such interstate transportation. Furthermore, this Court's prior decisions unambiguously instruct that state regulation, *even if nominally within a regulatory sphere reserved to the states by the NGA*, must yield to FERC's jurisdiction if such state regulation would hinder or frustrate FERC's efforts to achieve comprehensive, uniform regulation of interstate transportation.

Here, the court of appeals determined that capacity release transactions were part of an activity -- the interstate transportation of natural gas -- committed to FERC's exclusive jurisdiction by the NGA. Having so found, the court of appeals, in light of the NGA's language and purpose, as well as the prior decisions of this Court, necessarily rejected the contentions, pressed here by the petitions, that the NGA reserved regulation of capacity release transactions between LDCs and their customers, and by municipalities, to state or local authorities. To do otherwise would have opened the door to the regulation of capacity release transactions by multiple state and local regulatory bodies, thereby hindering, if not precluding, FERC's ability to regulate an aspect of interstate transportation -- the reallocation of interstate pipeline capacity -- in the comprehensive, uniform manner intended by the NGA.

Finally, the petitions do not dispute the court of appeals' determination that capacity release transactions are matters subject to FERC's NGA Section 1(b) jurisdiction over interstate transportation. Petitioners' concession on this general jurisdictional determination is fatal to their specific jurisdictional arguments about releases in specific settings. Having conceded that capacity release transactions come within

FERC's exclusive NGA jurisdiction over the interstate transportation of natural gas, Petitioners cannot then credibly argue that the statute simultaneously guarantees "the primacy of state regulation," (LDC Petition at 19) regarding the interstate transportation activities of certain entities (*i.e.*, LDCs and municipalities). Indeed, as noted earlier, the states' *complete lack* of jurisdiction over the interstate transportation of natural gas represented one of the factors necessitating passage of the NGA. If, as the PSCs contend, the NGA intended to reserve to the states "those areas which they had historically controlled," PSC Petition at 11, then Congress could not have reserved to the states the right to regulate an interstate transportation activity such as capacity release because, as the petitions concede, the Commerce Clause denied the States any authority to regulate the transportation of natural gas in interstate commerce. LDC Petition at 4; PSC Petition at 11.

III. The PSC and LDC Petitions Fail to Demonstrate That Capacity Release Transactions Fall Within the States' Jurisdiction Over "Local Distribution."

The petitions submitted by the PSCs and the LDCs make much of the "historic state authority over LDCs and intrastate customers." LDC Petition at 25. *See also* PSC Petition at 14 ("the States long have had power to regulate all aspects of the relationship between LDCs and their end-users"). The PSCs and LDCs contend that, through the jurisdiction reserved to the states by NGA Sections 1(b) and 1(c), Congress intended that states retain "a *comprehensive* scheme of rate control over LDCs." LDC Petition at 24 (emphasis in original). *See also* PSC Petition at 15 ("the state agency has the authority, and a duty, to translate that cost of service into rates that satisfy local concerns"). This comprehensive scheme of state regulation purportedly requires "consistency and exclusivity of control over LDCs' relationship with their local customers"

including the manner in which LDCs reassign their right to use interstate pipeline capacity to those customers. LDC Petition at 24. Otherwise, LDCs might release their interstate pipeline capacity exclusively to out-of-state interests, thereby denying LDC ratepayers the benefit of their "investment" in interstate pipeline capacity. LDC Petition at 27; PSC Petition at 13-14. The PSCs and LDCs characterize FERC's NGA jurisdiction as wholly derivative of and supplemental to the states' jurisdiction. *See, e.g.,* LDC Petition at 19 ("the scope of state authority should have been the touchstone for determining the scope of federal authority"); PSC Petition at 11 (NGA enacted "to fill the gaps in regulatory authority where the States were precluded from acting"). However, whether or not one agrees with the petitioners' policy quarrel with FERC, the petitioners' jurisdictional arguments are baseless.

The interpretation of NGA jurisdiction proffered by the PSCs and LDCs attempts to bootstrap state regulatory authority over rates for "local distribution" into a broader jurisdictional mandate. By framing the crux of their jurisdictional argument in malleable terms such as "the service that LDCs provide to their customers," PSC Petition at 10, and "local distribution companies' services to end-users within the state" LDC Petition at 18, they subtly seek to expand the scope of activities subject to state regulatory authority.

The release of interstate pipeline capacity by an LDC to its customer, however, is not a "service" subject to state jurisdiction for the fundamental reason that it is not a "service" that the states possess authority to regulate on their own. Recall that after issuance of Order No. 436, FERC -- not state regulatory agencies -- authorized pipelines' capacity release, capacity brokering, and capacity reassignment programs. *See supra* notes 6-8.

As the court of appeals correctly determined, capacity release requires either the *temporary or permanent abandonment* of pipeline service to one interstate pipeline customer and the corresponding *initiation of interstate transportation* service to the "replacement" shipper. Pet. App. at 80a. Both abandonment and initiation of interstate transportation service -- the core elements of a capacity release transaction -- are committed to FERC's jurisdiction by NGA Sections 1(b), and are made expressly subject to FERC's approval by NGA Sections 7(b) and 7(c), respectively. 15 U.S.C. §§ 717f(b)(c). For these reasons, plus FERC's exclusive authority over pipelines' tariffs terms and conditions, the court of appeals was correct in concluding that the states "have never regulated the terms and conditions of interstate pipeline transportation." Pet. App. at 82a.

Furthermore, even assuming for argument's sake that FERC's jurisdiction over capacity release transactions was uncertain, the consequences that flow from the state-centric jurisdictional analysis urged by the PSCs and LDCs would necessitate committing those transactions to federal jurisdiction. As this Court explained in *FPC v. Louisiana Power & Light Co*, 406 U.S. 621, 631 (1972):

> [I]n a borderline case where congressional authority is not explicit we must ask whether state authority can predictably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.

(*quoting FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-20 (1961)). There, the Court decided that direct sales by interstate pipelines to end-users -- which are not subject to FERC rate regulation -- were subject to FERC's curtailment regulations. In addition to finding curtailment a

matter of interstate transportation, the Court concluded that "[c]omprehensive and equitable curtailment plans for gas transported in interstate commerce . . . are practically beyond the competence of state regulatory agencies." *Louisiana Power & Light*, 406 U.S. at 641. The Court reasoned that:

> the inevitable result would be varied regulatory programs of state courts and agencies, interpreting a countless number of different contracts and applying a variety of state agency rules . . . Besides, a state agency empowered to regulate these contracts would be obliged to regulate in the State, not the national interest.

Id. at 633.

Here, the PSCs and LDCs assert state jurisdictional preeminence over but one aspect of capacity release transactions: releases of interstate transportation made by LDCs to their customers. *See* PSC Petition at 13, 14; LDC Petition at 3, 24. Their petitions do not contend, for example, that releases made by LDCs to entities outside their service territories, or releases obtained by an LDC's end-user customers from an entity other than the LDC, come within a state's regulatory jurisdiction. Thus, even if accepted, the PSCs' and LDCs' jurisdictional claims would leave states without authority to "predictably regulate" all capacity release transactions. Under such circumstances, *Louisiana Power & Light* teaches that extension of state jurisdiction would be unwarranted.[14/]

[14/] This analysis applies with equal force to the municipalities' argument that their capacity release transactions -- but not other capacity release transactions -- are definitionally excluded from FERC's NGA jurisdiction and, therefore, are subject to state or local regulation.

Moreover, partial state jurisdiction over certain capacity release transactions inevitably would bring about the type of cross-cutting, self-interested state regulatory actions eschewed by the Court in *Louisiana Power & Light*. Worse still, the jurisdictional theory espoused by the PSCs and LDCs would produce simultaneous FERC/state regulation of capacity release transactions, the very kind of "overlapping control" that, according to Petitioners, Congress did not intend when it passed the NGA. LDC Petition at 18. *See also* PSC Petition at 14-16 (discussing NGA's "dual jurisdictional design"). If every state could promulgate its own regulations governing LDCs releases of interstate capacity to their own customers, a system of preferences and rates could develop that would interface with interstate transportation access and the federally approved interstate capacity release market. Indeed, the conflicting state and federal regulatory objectives described by the LDCs' petition all but ensure that the dual jurisdiction over capacity releases produced by their interpretation of the NGA would yield regulatory conflict. *See* LDC Petition at 25-28.

Finally, contrary to the PSCs' and LDCs' contentions, FERC's capacity release regulations do not infringe on the states' legitimate ratemaking jurisdiction regarding local distribution service. FERC's regulations establish the maximum rate that can be charged for interstate transportation, including in a capacity release transaction; they do not affect how costs incurred by LDCs are treated for ratemaking purposes at the state level. States' regulatory bodies remain free to allocate the costs of pipeline capacity among LDC customer classes in the manner they deem in the public interest. Equally important, state regulators can (and do) require LDCs to use revenues obtained through capacity releases to reduce the fixed costs borne by the ratepayers whose rates have

"purchased" that interstate pipeline capacity.[15/] In this way, the LDC's ratepayers benefit from its capacity release transactions. Accordingly, claims that ratepayers will lose the benefit of their "investment" in interstate pipeline capacity absent state jurisdiction over LDC capacity release transactions lack substance.

15/ *See, e.g., Re Guidelines for Further Unbundling of Natural Gas,* 148 P.U.R. 4th 441, 444 (N.J. BPU 1993)(directing that the aim of an LDC's capacity release program "should be to provide the greatest contribution to the system's fixed capacity costs, while maintaining reliability for the firm sales customers").

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari in Nos. 96-1186, 96-1187, and 96-1188 should be denied.

Respectfully submitted,

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